

# VERMONT PUBLIC POWER SUPPLY AUTHORITY

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July 21, 2009

Susan M. Hudson, Clerk  
Vermont Public Service Board  
112 State Street, Drawer 20  
Montpelier, VT 05620-2701

re: docket 7523  
Implementation of Standard Offer Prices for  
Sustainably Priced Energy Enterprise Development  
("SPEED") Resources

and

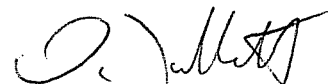
docket No. 7533  
Establishment of Price for Standard Offer under the  
Sustainably Priced Energy Enterprise Development  
("SPEED") program

Dear Mrs. Hudson:

Enclosed for filing please find an original and six copies of the Brief of the Group of Municipal Electric Utilities relative to Board staff memorandum of July 15, 2009. This document and cover letter have been served electronically to those on the service list.

Thank you for your consideration.

Very truly yours,



David John Mullett

cc: service list

**STATE OF VERMONT  
PUBLIC SERVICE BOARD**

Docket 7523  
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Sustainably Priced Energy Enterprise Development  
("SPEED") Resources

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*Brief of the Group of Municipal Electric Utilities relative to  
Board staff memorandum of July 15, 2009*

The Group of Municipal Electric Utilities ("GMEU") makes this filing in accordance with the Board staff memorandum of July 15, 2009. This filing specifically addresses issues 1 and 3 as set forth in that memorandum. Should the Department of Public Service or some other party make a filing with respect to the auction question set forth as issue 2, the GMEU will respond by the July 27, 2009 response date.

*Issue 1: the nature of docket 7533*

The pace of activity mandated by the Vermont Energy Act of 2009 ("the Act") is frenetic in the early stages, and the Board and parties should be commended for their diligence in meeting that pace. In a race that must be run quickly both in commencement and speed, however, a false start is potentially catastrophic. It is in the spirit of avoiding a potential false start that the GMEU raised this issue early on, and raises it again here. A prospective solution is also offered for consideration and comment by the many parties to this matter.

*A. The problem*

The problem arises from the unique wording surrounding what the Board is supposed to do by September of this year, which is to:

*[O]pen and complete a noncontested case docket to accomplish each of the following tasks:*

*(1) Determine whether there is a substantial likelihood that one or more of the prices stated in subdivision (2)(A) of this subsection do not constitute a reasonable approximation of the price that would be paid applying the*

*criteria of subdivision (2)(B)(i).*

*(II) If the board determines that one or more of the prices stated in subdivision (2)(A) of this subsection do not constitute such an approximation, set interim prices that constitute a reasonable approximation of the price that would be paid applying the criteria of subdivision (2)(B)(i). Once the board sets such an interim price, that interim price shall be used in subsequent standard offers until the board sets prices under subdivision (B)(iii) of this subdivision (2).*

30 V.S.A. §8005(b)(2)(B)(ii).

In figuring out what this means in relation to dockets 7523 and 7533, case law mandates an approach that even a cynic would concede reflects good common sense: that the words used in a statute are to be interpreted in accordance with their plain meaning. See *In re Petition of Twenty-Four Vermont Utilities*, 178 Vt. 244, 882 A.2d 1295 (1992). In this case, the legislature carved out something unique – a “noncontested case docket-” relative to the September activities. Whatever that may mean (something not entirely clear, as the phrase does not seem to show up anywhere else in the Vermont statutes), it is a narrow exercise the purposes of which are set out in the two substantive paragraphs quoted above. That the exercise is not broader or more permanent than that is evident from a couple of things, both clear from plain reading of the statute. First, the legislature did not extend the “noncontested case docket” exercise to the January 2010 rate setting, the establishment of contract structure, the organization of a queue, or anything else. Second, in the first sentence quoted above, the legislature told the Board to “open and *complete*” the noncontested event by a date certain, not to expand it and keep it going to later times and into other subjects. The task here is simply to do what the legislature said, and to recognize and respect that it carved out only a limited and narrow exception to the core values of Vermont law that say agency actions should come about through more formal processes. This means that docket 7523 should be about the noncontested preliminary determinations set forth above, and nothing else. To “import” docket 7523 into docket 7533, and/or to treat docket 7533 as a noncontested case, creates a strong likelihood that a party aggrieved by the outcome of docket 7533 would succeed in having decisions in that docket overturned on appeal. See *In re Burlington Electric Department*, 151 Vt. 543, 563 A.2d 264 (1989) (Board ruling on allocation of wood chip transportation reversed where utility had “no meaningful opportunity for hearing in this case”); *In re Petition of Burlington Electric Department*, 149 Vt. 300, 542 A.2d 294 (1988) (decisions of administrative agencies entitled to great weight, but only where “the administrative proceedings have provided notice and an opportunity to be heard”).

#### *B. How to solve the problem*

Docket 7533 should (1) proceed as a contested case; (2) continue to utilize workshops and/or other informal procedures; and (3) enable the parties to continue working with selected Board staff through a Board order isolating those staff members from the determination of issues upon which resolution cannot be reached.

1. *Proceeding as a contested case.* This conclusion is compelled by a process of elimination of other options as much as anything. As discussed above, the portion of the statute mandating the noncontested case docket does not apply to anything beyond the September preliminary determination. While Board staff discussed the possibility of a rulemaking at the last workshop, the timeframes surrounding rulemaking under Vermont's Administrative Procedures Act make it challenging to the point of virtual impossibility to achieve implementation of a rule by the January 15, 2010 deadline for having rates in place. See 3 V.S.A. §§ 836-843 (multifaceted rulemaking requirements including prefiling, notice requirements, publication, public hearing and review by legislative rules committee). Moreover, the standard applicable for emergency promulgation is not met in this instance. See 3 V.S.A. § 844 (emergency rules allowable only where "imminent peril to public health, safety or welfare"). What is left at this juncture is a contested case, although the parties and the Board can, and perhaps should, consider in due course whether rulemaking is appropriate surrounding the 2012 and subsequent rate setting processes.

2. *Continued utilization of informal procedures.* That a case is "contested" within the definition of Vermont law does not mean that it has to end in a dispute, or that informal procedures cannot be used to try to resolve as many issues as possible. In docket 7081, for example, the parties utilized an extensive mediation process that resulted in most of them reaching a settlement memorandum of understanding, and the Board held a hearing to resolve one party's arguments that the settlement should not be accepted. *Docket 7081, Investigation into Least-Cost Integrated Resource Planning for Vermont Electric Power Company, Inc.'s Transmission System*, Order of June 20, 2007. There appears to be no reason that a similar thing could not be done here, in the hope that the parties' efforts (already well underway) can result in wide areas of agreement, while preserving the opportunity for hearing and Board resolution in areas where agreement may not be reached. It should also be noted that an order resulting from a contested case proceeding has advantages of finality, since once the thirty day appeal period has passed, later attacks on the Board's order become difficult.

3. *Separation of Board staff.* No party can rightly disagree with the proposition that Board staff brings helpful experience and expertise to the implementation of the Act. The use of unlimited *ex parte* communications in that context, however, is problematic. Title 30 sets forth a clear delineation of responsibilities between the Board and the Department of Public Service, conferring on the former the adjudicatory function in contested cases. Moreover, the Board's rule on the subject rigidly restricts *ex parte* communications to situations where such communications are "required for the disposition of *ex parte* matters authorized by law," and extends that prohibition to all members, employees and agents of the Board. See Board Rule 2.201(E)(1). Staff's observation at the last workshop that *ex parte* communications might be permissible because the Board could proceed by rulemaking is not persuasive; as discussed above, docket 7533 – already opened as a docket- is not a rulemaking at this time, and cannot likely be one given the legislative time constraint. That the subject is important, and the time short, is not a reason for short circuiting contested case procedure, and creating an attendant risk that litigation over the procedural issues could delay ultimate implementation of the Act.

Fortunately, the dilemma of staff participation, especially now that it has started, admits of a simple practical solution. Rule 2.107 allows the Board to waive its rules for good cause, including “to prevent unnecessary hardship or delay.” If the Board coupled a limited waiver of the *ex parte* rule to enable certain staff members to continue working on this docket to continue to do so, while simultaneously indicating that those same staff members would not be involved in the decision making process relative to disputed issues, the benefits of participation, coupled with significant mitigation of the risks of claims arising from that participation, would be achieved. GMEU respectfully requests that the Board enter such an order.

### *Issue 3: Project Eligibility*

*Questions 1 through 4.* Each of these questions goes to eligibility of projects relative to their timing. While the Act is not clear regarding this issue, GMEU submits that a simple, bright line rule is appropriate, and that the rule should be that no project that had filed for regulatory approval of any type as of the effective date of the Act should be eligible for the standard offer rate. It seems clear from the tenor of the legislative debate, and the overall nature of the Act, that the Act was intended to promote the aggressive development of small-scale renewable resources falling within its parameters. It is reasonable to conclude that any developer who filed for a regulatory approval prior to that date had made a decision to proceed based on the status of economics and regulation existing at that time, and not in reliance upon a standard offer program that did not yet exist.

*Question 5.* The statute contains no limit on the participation of small-scale facilities, as it mandates standard offers “for qualifying SPEED resources with a plant capacity of 2.2 MW or less. 30 V.S.A. §8005(b)(2). Whether facilitator costs or other factors render that participation uneconomic for very small projects is something that will be seen going forward.

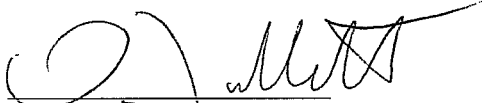
*Question 6.* The question of whether there are statutory barriers to establishment of a queue has at least two important subparts: whether a queue can be established at all, and, if so, whether that queue can be subdivided between the various technologies set forth in the Act as suggested by some parties in their earlier comments. GMEU believes that the answer to the first question is “yes.” Case law has long recognized that the Board holds such implied incidental powers as are necessary to the full exercise of those granted by the legislature. *Trybulski v. Bellows Falls Hydro-Electric Corp.*, 112 Vt. 1, 20 A.2d 117 (1941). The establishment of a queue as a vehicle for implementation of the Act is an appropriate exercise of that incidental power, especially given that a lack of orderly implementation through a queue or some similar mechanism would likely result in a level of chaos that could thwart effective implementation. Moreover, the Board has already utilized a queue concept in the implementation of Rule 4.100, notwithstanding that the underlying statute, 30 V.S.A. §209(a)(8), did not explicitly authorize the Board to do so.

The second component of the question- subdivision of a queue by technology- is a closer one. On the one hand, the degree of specificity set forth by the legislature as to size, project type, initial rates and other factors invites a conclusion that the legislature would have divided

the 50 MW total into subparts had that been its intention. On the other hand, it is clear that the legislature envisioned development of multiple technologies under differentiated rates, and that it left the Board considerable discretion in the implementation of the Act. GMEU believes that the second of these arguments is somewhat the better one as a matter of statutory construction, and looks forward to review of other parties' comments on these issues.

Thank you for this opportunity to comment.

Dated this 21st day of July, 2009.

A handwritten signature in black ink, appearing to read "DM", is written over a horizontal line.

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